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No. 03-

IN THE

Supreme Court of the United States

DON APPLEGATE, *et al.*

Petitioners,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an extensive line of cases, beginning with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), this Court set forth detailed standards applicable to attorneys' fee petitions in statutory fee-shifting cases; however, this Court expressly limited those cases to attorneys' fee awards in *statutory fee-shifting* cases.

The first question presented by the petition is: Whether the Court of Federal Claims properly held—in conflict with this Court's decisions and the Seventh and Ninth Circuits—that the legal restrictions and prohibitions of statutory fee-shifting cases control the interpretation of a non-statutory, contractual settlement agreement calling for the payment of reasonable attorneys' fees.

2. In *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986), and *Blum* v. *Stevenson*, 465 U.S. 886 (1984), this Court held that, in exceptional circumstances, a court can enhance an attorneys' fee award.

The second question presented by the petition is: Whether the Court of Federal Claims properly held—in conflict with this Court's decisions and the Fourth and Ninth Circuits—that attorneys' fee petitioners must satisfy an impossible legal standard for exceptionality that renders a nullity this Court's authorization of enhancement in exceptional cases.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Applegate, *et al.* were plaintiffs and appellants below. Respondent United States was defendant and appellee below.

Pursuant to S. Ct. Rule 29.6, none of the corporate Petitioners is owned by a parent corporation, nor is more than ten percent of any corporate Petitioner owned by any publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Don Applegate, *et al.* ("Applegate") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Federal Circuit affirming without opinion the Court of Federal Claims's judgment is unreported and reprinted in the appendix hereto ("App.") at 1a. The opinion of the Court of Federal Claims is reported at 52 Fed. Cl. 751 and is reprinted at App. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 2003. App. 2a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Section 4654(c) of Title 42 of the United States Code, provides:

> The Court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal Agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

INTRODUCTION

On October 29, 1999, after seven years of litigation, Petitioners (who numbered over 300 individuals, cities and businesses in Brevard County, Florida) entered into a Settlement Agreement with the United States that marked the *first and only time* the United States has settled a beach erosion inverse condemnation case with both the payment of millions of dollars in damages and construction of a massive beach renourishment project. Moreover, the Settlement Agreement placed the burden solely upon Petitioners to "endeavor to obtain Congressional appropriations" for the beach renourishment project. Over the next three years, despite continued opposition, Petitioners obtained the necessary Congressional appropriations to secure construction of the

$42 million beach re-nourishment project. Petitioners waged this difficult battle on a wholly contingent fee basis, expending over 13,000 hours of attorney time. Appellants' Fed. Cir. Br. 2, 4, 5, 8, 17, 18.[1]

The Settlement Agreement provided that Petitioners were entitled to "recover reasonable attorneys' fees * * * incurred in connection with the Lawsuit * * * in an amount to be agreed to by the parties * * * or, failing agreement, as determined to be reasonable by [the court]." App. 6a. At the attorneys' fee hearing, undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that the fees incurred thereunder were actually incurred—the usual measures of reasonableness in inverse condemnation actions. Appellants' Fed. Cir. Br. 61; Fed. Cir. Reply Br. 28. Petitioners sought a reasonable fee of $5 million to $12.5 million based upon the value of benefits obtained by the settlement. Appellants' Fed. Cir. Br. 20. Rather than following the parties' contractual Settlement Agreement (which the court found to be independent of any fee-shifting statute) and reviewing for reasonableness the fee yielded by Petitioners' fee agreements, the lower court deemed itself bound by the prohibitions of this Court's statutory fee-shifting jurisprudence, limited itself to a severely restricted lodestar calculation, refused to consider the relevance of Petitioner's contingent fee agreements, and refused to award an enhancement for exceptional results on the grounds that Petitioners had not recovered anything more than they were owed. App. 23a-28a, 44a-47a.

Historically, this Court and the federal circuit courts have placed attorneys' fee petitions into three distinct categories: those based upon fee-shifting statutes, those involving

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[1] Throughout this petition, "Appellants' Fed. Cir. Br." and "Fed. Cir. Reply Br." refer to the Petitioners' Brief and Petitioners' Reply Brief, respectively, filed in the United States Court of Appeals for the Federal Circuit in this matter.

distribution from a common fund, and those based solely upon contractual agreements to pay reasonable attorneys' fees. *See Wing* v. *Asarco*, 114 F.3d 986, 989 (9th Cir. 1997). Of the three categories, fee-shifting is the most restrictive, limiting awards to hourly rates only and allowing enhancement over and above hourly rates only in exceptional circumstances. In the instant case, the lower court was faced with a contractual agreement for the payment of reasonable attorneys' fees that the lower court itself found to be independent of any fee-shifting statute. Rather than determine the reasonableness of the fee under the contingent fee agreements, however, the lower court applied the restrictions and prohibitions of this Court's fee-shifting jurisprudence to award a greatly reduced hourly fee that was less than Petitioners' attorneys would have been paid had they taken the case on a non-contingent fee basis.

This case first presents the question whether the restrictions and prohibitions announced by this Court in its numerous statutory fee-shifting decisions are applicable to an award of attorneys' fees under a non-statutory, contractual settlement agreement.

This Court first announced in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983), that "[t]he standards set forth in this opinion are generally applicable in all cases *in which Congress has authorized an award of fees to a 'prevailing party.'* " (Emphasis added.) This principle—that fee-shifting principles apply solely to fee applications under fee-shifting statutes—resonates throughout the later cases decided by this Court, each beginning with *Hensley* and relying heavily upon detailed examinations of Congress's intent in enacting the statutes at issue. *See City of Burlington* v. *Dague*, 505 U.S. 557, 562, 565 (1992); *Blanchard* v. *Bergeron*, 489 U.S. 87, 91-95 (1989); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986) (*Delaware Valley I*); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 723-724 (1987) (*Delaware Valley II*); *City of Riverside*

v. *Rivera*, 477 U.S. 561, 567 (1986); *Blum* v. *Stenson*, 465 U.S. 886, 893-896 (1984). Indeed, in *Gisbrecht* v. *Commissioner of Social Security*, 535 U.S. 789 (2002), this Court made a significant distinction between how fees are determined under fee-shifting statutes and how they are to be determined under 42 U.S.C. § 406(b), a non-fee-shifting statute authorizing a percentage recovery.

In keeping with this Court's decisions, both the Seventh and Ninth Circuits have squarely held that, in the context of a written settlement agreement providing for an award of reasonable attorneys' fees to one party, neither statutory fee-shifting principles nor common fund principles control the determination of fees. *See Wing* v. *Asarco*, 114 F.3d 986 (9th Cir. 1997); *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591 (7th Cir. 1991). Rather, those courts held that such a fee award is a matter of contract interpretation alone.

In conflict with this Court's decisions and those of the Seventh and Ninth Circuits, the Court of Federal Claims applied the restrictions developed for statutory fee-shifting cases to this contractual fee application, despite finding that there was "not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the URA."[2] In fact, the Court of Federal Claims held that the parties' Settlement

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[2] "URA" is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c). The URA would have applied to this inverse condemnation case had it proceeded to trial and judgment. Under the URA, the Attorney General is required to reimburse prevailing plaintiffs for their "reasonable" fees and costs that are "actually incurred." One factor the court considers in determining what is reasonable under the URA is the plaintiffs' contingent fee agreements. *See Osprey Pacific Corp.* v. *United States*, 42 Fed. Cl. 740 (1999), *appeal dismissed*, 215 F.3d 1344 (Fed. Cir. 1999) (voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42(b)).

Agreement required it "to determine a 'reasonable' fee independent of any alleged limitations associated with the URA." App. 11a, 15a; S. Ct. Rule 10(a), (c). Despite this Court's observation almost a century ago that "[a] Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument," *Hollerbach* v. *United States*, 233 U.S. 165, 171-172 (1914), the lower court bound itself to "severely restricting" statutory fee-shifting principles, App. 19a, and refused to consider the reasonableness of the contingent fee agreements, as is done in inverse condemnation cases. *See Osprey Pacific Corp.*, 42 Fed. Cl. at 742-743.

Even if the Court of Federal Claims was entitled to apply fee-shifting restrictions and prohibitions to Petitioners' fee petition, this case further presents the question whether and under what standards an attorneys' fee petitioner is entitled to a fee enhancement in an exceptional case.

This Court has repeatedly stated that, where fee-shifting statutes apply, fee enhancement is warranted in exceptional cases. *See Delaware Valley I*, 478 U.S. at 565 (finding enhancement proper in rare and exceptional cases); *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 435 (concluding enhanced award justified in cases of exceptional success)). The Court of Federal Claims's adoption of an impossible standard for exceptionality would render a nullity this Court's clear intent to allow enhancements for exceptional results. S. Ct. Rule 10(c).

In addition to conflicting with this Court's precedent, the Court of Federal Claims's standard for exceptionality conflicts with the decisions of the Fourth and Ninth Circuits. S. Ct. Rule. 10(a). In a case where plaintiffs obtained results similar in scope and effect to those at issue here, the Fourth Circuit approved a results "enhancement" to fees to be paid

by defendant, though the relief ordered was no more than that sought by plaintiffs. *See Hyatt* v. *Apfel*, 195 F.3d 188 (4th Cir. 1999). The Ninth Circuit has measured exceptionality not based on whether a plaintiff in a particular case has achieved more than it set out to achieve, but rather based on an assessment of the exceptional efforts and achievements of counsel in the case as presented. *See Wing*, 114 F.3d at 989.

This case raises important questions of federal contract law. The United States Court of Federal Claims is a court of National jurisdiction. *See Branning* v. *United States*, 7 Cl. Ct. 777, 783 (1985). Thus, its decisions—and those of the United States Court of Appeals for the Federal Circuit—have National implications. Imposing cases construing Congressional intent upon voluntary agreements of the Executive Branch undermines the sanctity of the government's contractual agreements, interjects uncertainty into federal contract law, and deprives Petitioners of the benefit of their bargain. Moreover, as this Court has previously observed, public policy wisely encourages settlement. *See McDermott* v. *AmClyde*, 511 U.S. 202, 215 (1994). Allowing a decision to stand that adds unbargained-for terms to a parties' settlement agreement, derived not from the parties' intent but from Congressional intent, would inject uncertainty into the settlement process, discourage settlement, and thwart public policy.

STATEMENT OF THE CASE

Background. On December 4, 1992, Petitioners filed suit against Respondent seeking just compensation for forty years of extensive erosion to their beachfront properties caused by the government's construction and operation of Canaveral Harbor in Brevard County, Florida. On June 14, 1993, the Court of Federal Claims dismissed Petitioners' complaint on statute of limitations grounds. *See Applegate* v. *United States*, 28 Fed. Cl. 554 (1993). Petitioners appealed the trial court's dismissal, and the Federal Circuit reversed. *Apple-*

gate v. *United States*, 25 F.3d 1579 (Fed. Cir. 1994). Thereafter, after seven years of contested litigation, on October 29, 1999, Petitioners entered into an unprecedented Settlement Agreement with Respondent, marking the *first and only time* the United States has settled a beach erosion inverse condemnation case with both the payment of millions of dollars in damages and a massive beach re-nourishment project.[3] Moreover, the Settlement Agreement placed the burden solely upon Petitioners to "endeavor to obtain Congressional appropriations" for the beach re-nourishment project.[4] Over the next three years, despite continued opposition,[5] Petitioners obtained such Congressional appropriations and secured construction of the $42 million beach re-nourishment project. Petitioners waged this difficult battle on a wholly contingent fee basis, expending over 13,000 hours of attorney time. Appellants' Fed. Cir. Br. 2, 4, 5, 8, 17, 18.

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[3] The United States paid $5 million in damages under the Settlement Agreement, plus interest from the date of settlement and attorneys' fees and costs. The Settlement Agreement also resulted in a beach re-nourishment project costing $42 million. Appellants' Fed. Cir. Br. 2, 4, 21. The benefit to beachfront property values as a direct result of the project totaled $220 million. Fed. Cir. Reply Br. 5 n.1.

[4] The Settlement Agreement provided it would not be effective unless and until Congress appropriated at least $8.5 million of the Federal funds for the re-nourishment project, an appropriation the U.S. Army Corps of Engineers opposed. Appellants' Fed. Cir. Br. 16-17, 18 n.8. This placed a double risk of non-payment upon counsel for Petitioners—first under their contingent fee agreements and second under the contingency of Congressional appropriation.

[5] Prior to and throughout the litigation, the U.S. Army Corps of Engineers vehemently opposed construction of the Brevard County re-nourishment project. Appellants' Fed. Cir. Br. 8, 33. Indeed, on the very day the Settlement Agreement was executed, Respondent advised Petitioners by letter that "the current administration does not support the funding of beach renourishment projects." Appellants' Fed. Cir. Br. 17.

Attorneys' Fee Proceedings. The Settlement Agreement provided that "Plaintiffs are entitled to recover reasonable attorneys' fees * * * incurred in connection with the Lawsuit * * * in an amount to be agreed to by the parties * * * or, failing agreement, as determined to be reasonable by the United States Court of Federal Claims Judge Lawrence S. Margolis."[6] App. 6a. After Judge Margolis recused himself, the case was assigned to Judge Francis M. Allegra, who conducted an evidentiary hearing on January 29 and 30, 2002. Appellants' Fed. Cir. Br. 19. At the evidentiary hearing, Petitioners presented evidence supporting a reasonable fee of $5 million to $12.5 million, based upon the value of the benefits obtained. Appellants' Fed. Cir. Br. 20.

Fee Award. In its opinion, the Court of Federal Claims first correctly observed that "as a matter of simple contract interpretation, there is no indication that the Agreement incorporated the attorney's fee provisions in the URA. An agreement to settle a legal dispute is a contract, the interpretation of which is governed by familiar principles." App. 10a. The court found there to be "no ambiguity in the contract itself," and concluded that "there is not a shred of evidence that suggests either that the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by URA, or even that defendant somehow unilaterally expressed or reserved this point." App. 11a & n.6 Finally, the court conclusively stated:

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[6] The fee in this case is not a court "awarded" fee. Petitioners' entitlement to recover their incurred fees derives solely from the contractual agreement of the parties. Petitioners' entitlement has no statutory basis nor does it derive from equitable entitlement resulting from creation of a common fund. The trial judge's sole duty authorized by the parties' agreement was to determine the reasonable amount of the incurred fees Petitioners were entitled to recover failing an agreement of the parties as to the amount.

> [T]his court readily concludes that the Agreement simply requires it to determine a "reasonable" fee independent of any alleged limitations associated with the URA. App. 15a.

Nevertheless, the lower court found that "this case should be guided by statutory-fee shifting principles,"[7] App. 23a, and severely restricted Petitioners' fee petition using the statutory fee-shifting prohibitions developed by this Court in *Dague*, *Blanchard*, *Delaware Valley I*, *Blum*, and *Hensley*.[8] App. 23a-28a. The lower court concluded that it was bound by those decisions to reject any consideration of the reasonableness of Petitioners' contingent fee agreements, despite undisputed evidence and Respondent's admissions to the contrary,[9] and instead applied this Court's fee-shifting restrictions and prohibitions as if the case before it was a statutory fee-shifting case. Moreover, in denying Petitioners' request for an exceptional results enhancement to the lodestar, the lower court adopted an impossible standard for exceptionality that precludes a "results enhancement" unless the petitioner achieves a result other than the one sued for

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[7] The court further affirmed that "the principles applicable in fee-shifting cases * * * shall be applied by this court." App. 22a-23a.

[8] In particular, the Court of Federal Claims stated that nothing about the instant case set it apart from *Dague*. App. 27a n.20.

[9] At the evidentiary hearing, undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that all fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61; Fed Cir. Reply Br. 28. If Claims Court precedent had been properly applied, this should at least have been a *factor* in considering reasonableness. *See Osprey Pacific Corp.*, 42 Fed. Cl. at 742 ("[W]here there is sufficient evidence that the contingent fee is 'reasonable' in light of the complexity and time requirements of the case, a plaintiff may recover attorney fees based on a contingency agreement.").

and greater than that which is owed. The Court articulated this new standard as follows:

> The results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. Accordingly, measured by plaintiffs' own expectations at the outset of the case, the results obtained were not exceptional, but rather reflect what was owed. App. 46a.

The Federal Circuit affirmed without opinion the decision of the Court of Federal Claims on July 17, 2003. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF FEDERAL CLAIMS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE APPLICABILITY OF STATUTORY FEE-SHIFTING RESTRICTIONS AND PROHIBITIONS TO AN AWARD OF ATTORNEYS' FEES UNDER A NON-STATUTORY, CONTRACTUAL SETTLEMENT AGREEMENT.

1.a. This Court first announced in *Hensley*, 461 U.S. at 433 n.7, that "[t]he standards set forth in this opinion are generally applicable in all cases *in which Congress has authorized an award of fees to a 'prevailing party.'* " (Emphasis added.) This principle that fee-shifting principles apply solely to fee petitions under fee-shifting statutes resonates throughout the later cases decided by this Court, all of which have *Hensley* as their starting point and all of which rely heavily upon detailed examinations of Congressional intent in enacting the statutes at issue. *See Dague*, 505 U.S. at 562, 565; *Blanchard*, 489 U.S. at 91-95; *Delaware Valley I*, 478 U.S. at 559-560; *Delaware Valley II*, 483 U.S. at 723-724; *Rivera*, 477 U.S. at 567; *Blum*, 465 U.S. at 893-896. The Court of Federal Claims is the only court to reject this well-established jurisprudence and to hold that this Court's fee-shifting cases are binding upon parties to a settlement agreement that

incorporates no fee-shifting statute. In doing so, the Court of Federal Claims, and the Federal Circuit through its affirmance, created a conflict with the Court's established jurisprudence and impermissibly engrafted Congressional intent upon the parties' Settlement Agreement.

In *Hensley*, this Court first began to develop the body of modern law pertaining to fee awards under fee-shifting statutes. This Court exhaustively examined Congress's intent in enacting 42 U.S.C. § 1988 before delimiting the boundaries of its decision:

> The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party." *Hensley*, 461 U.S. at 433 n.7.[10]

b. Several cases followed *Hensley*, and in each this Court began its analysis of the fee-shifting statutes in question by determining Congress's intent. *See Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983) (Court adopts "most reasonable interpretation of Congressional intent" with respect to 42 U.S.C. § 7607(f).); *Blum*, 465 U.S. at 896 (Resolution of question "turns on a statute and the intention of Congress."); *Rivera*, 477 U.S. at 580 ("Congress intended that statutory fee awards be 'adequate to attract competent counsel, but * * * not produce windfalls to attorneys.' " (citation omitted)); *Delaware Valley I*, 478 U.S. at 565 ("[S]trong presumption that the lodestar * * * represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case."); *Delaware Valley II*, 483 U.S. at 726 ("We are unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise

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[10] This principle was reaffirmed in *Dague*, 505 U.S. at 562 ("[C]ase law construing what is a 'reasonable' fee applies uniformly to all [fee-shifting statutes].").

reasonable fee."); *Blanchard*, 489 U.S. at 93 (Automatic ceiling on award "would be inconsistent with the statute and its policy and purpose."); *Dague*, 505 U.S. at 565 ("[N]o contingency enhancement whatever is compatible with the fee-shifting statutes at issue.").

In fact, just last Term, in *Gisbrecht*, 535 U.S. at 809. this Court instructed that, in the absence of statutorily created fee-shifting restrictions, lawful attorney-client fee agreements take primacy over statutory fee-shifting schemes and courts must simply "review for reasonableness fees yielded by those agreements." *Gisbrecht* involved an award of attorneys' fees under 42 U.S.C. § 406(b), which provided that a prevailing claimant's fees would be payable "out of the benefits recovered; in amount, such fees may not exceed 25 percent of past-due benefits."[11] *Id.* at 792. The lower court, in conflict with other circuit courts, had awarded fees based upon the body of case law governing fee-shifting statutes. This Court framed the issue in *Gisbrecht* in similar fashion to that faced by the Court of Federal Claims in this case:

> What is the appropriate starting point for judicial determinations of "a reasonable fee for [representation before the court]"? Is the contingent-fee agreement between claimant and counsel, if not in excess of 25 percent of past-due benefits, presumptively reasonable? Or should courts begin with a lodestar calculation (hours reasonably spent on the case times reasonable hourly rate) of the kind we have approved under statutes that shift the obligation to pay to the loser in the litigation? *Id.* (internal citations omitted).

Despite concluding that "the lodestar method today holds sway in federal-court adjudication of disputes over the

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[11] Similarly, Petitioners' fee agreements here provided for payment of "one-third (1/3) of the value of the benefits obtained." App. 4a.

amount of fees properly shifted to the loser in the litigation," this Court rejected application of the lodestar method to Gisbrecht's fee petition because 42 U.S.C. § 406(b) was not a fee-shifting statute. This Court stated:

> Fees shifted to the losing party, however, are not at issue here. Unlike 42 U.S.C. § 1988 (1994 ed. and Supp. V) and EAJA, 42 U.S.C. § 406(b) (1994 ed., Supp. V) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre: It authorizes fees payable from the successful party's recovery. *Id.* at 802.

Thus, this Court held that 42 U.S.C. § 406(b) did not "override customary attorney-client contingent-fee agreements." *Id.* at 808. Rather, courts must simply "review for reasonableness fees yielded by those agreements." *Id.* at 809. As a result, this Court reversed for recalculation of attorneys' fees under the contingent fee agreements:

> Because the decision before us for review rests on lodestar calculations and rejects the primacy of lawful attorney-client fee agreements, we reverse the judgment below and remand for recalculation of counsel fees payable from the claimants' past-due benefits. *Id.* at 793.

Gisbrecht aptly demonstrates that the body of case law developed by this Court in *Hensley* and its progeny is applicable only to awards of fees under fee-shifting statutes. Where contingent fee agreements exist and no fee-shifting statute applies, the reasonableness of the Petitioners' contingent fee agreements must be considered and the primacy of lawful attorney-client fee agreements cannot be overridden by statutory fee-shifting considerations.[12] Instead, the court

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[12] The significance of this primacy cannot be overstated. Numerous federal courts have recognized that, absent statutory restrictions, a reasonable fee for a lawyer who is paid promptly as litigation progresses is not a reasonable fee for a lawyer who bears

must review for reasonableness the fees yielded by those agreements.[13] Thus, the Court of Federal Claims's application of the fee-shifting restrictions and prohibitions of *Hensley* and its progeny to the non-statutory, contractual Settlement Agreement in this case, in the face of its finding that "there is not a shred of evidence that suggests * * * that the determination of a 'reasonable' attorneys fee would be

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the risk of non-payment if unsuccessful, as well as the delays and costs attendant thereto. *See Dague*, 505 U.S. at 567 (Blackmun, J., joined by Stevens, J., dissenting) ("[I]t is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome, and relevant professional standards long have recognized that this practice is reasonable."); *Delaware Valley II*, 483 U.S. at 736 (Blackmun, J., joined by Brennan, Marshall & Stevens, J.J., dissenting) (Contingency cases "are inherently riskier and an attorney properly may expect greater compensation for their successful prosecution."); *In re Washington Public Power Supply Sys. Sec. Litig.* (*WPPSS*), 19 F.3d 1291, 1299 (9th Cir. 1994) (Established practice in private legal market to reward attorneys for taking risk of non-payment by paying a premium over normal hourly rates.); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 612 (1st Cir. 1985) (Significant difference between a "case taken on a full retainer and a case in which an attorney spends many hours over a period of months or years with no assurance of any pay if the suit is unsuccessful."). In keeping with the above judicially-recognized reality, absent the restrictions of this Court's fee-shifting jurisprudence, a reasonable fee in the instant case would necessarily have been greater than the fee the lower court awarded.

[13] In *Osprey Pacific Corp.*, 42 Fed. Cl. 742-743, the Court of Federal Claims held that a contingent fee agreement between a petitioner and its client was a central factor in the court's analysis of "reasonable fees" that were "actually incurred." There is no dispute that the contingent fee agreements here were reasonable and the fees were actually incurred. *See supra* n.9.

controlled by the URA," is contrary to the jurisprudence of this Court.[14] App. 11a.

Contrary to the Court of Federal Claims's decision in this case, in none of the above cases did this Court hold that the body of law pertaining to fee-shifting statutes has equal application to voluntary contractual agreements to pay reasonable attorneys' fees. And with good reason. Doing so would improperly engraft Congressional intent upon an otherwise independent contractual agreement and impair the right of freedom of contract.

c. This Court has repeatedly held that lawful Government contracts must be interpreted as are contracts between individuals. The law of contracts governs, not the intent of Congress in some uncited, unmentioned statute. *See United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944) ("United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs."); *United States* v. *American Surety Co.*, 322 U.S. 96, 102 (1944) (Courts "are not justified in rewriting clear

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[14] The language of the Settlement Agreement, which provided that the lower court was to award fees "incurred in connection with the Lawsuit * * * as determined to be reasonable by the [court]," is in accord with the rule of law set forth in *Gisbrecht*. App. 6a. In the absence of fee-shifting restrictions, *Gisbrecht* instructs that the lower court should have reviewed for reasonableness the fees yielded by the Petitioners' fee agreements. Undisputed evidence and the admissions of Respondent established that Petitioners' contingent fee agreements were reasonable and that all fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61; Fed. Cir. Reply Br. 28. Yet the lower court, because it erroneously believed itself bound by inapplicable fee-shifting restrictions and prohibitions, failed to even consider the reasonableness of the fees yielded by Petitioners' fee agreements. Under *Gisbrecht*, however, the lower court could not properly ignore the Petitioners' fee agreements in reaching its decision.

provisions of contract to include what might well have been but was not inserted."). Indeed, almost one hundred years ago, this Court gave clear instruction as to the manner in which the lower court was required to interpret the parties' Settlement Agreement in this case:

> A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. *Hollerbach*, 233 U.S. at 171-172.

In the instant case, the lower court first properly ascertained the parties' intent, concluding that:

> [A]s a matter of simple contract interpretation, there is no indication that the Agreement incorporated the attorney's fee provisions in the URA. An agreement to settle a legal dispute is a contract, the interpretation of which is governed by familiar principles. App. 10a.

The Court found there to be "no ambiguity in the contract itself," and concluded that "there is not a shred of evidence that suggests either that the parties intended that the determination of a 'reasonable' attorneys fee would be con-trolled by the URA, or even that defendant somehow unilaterally expressed or reserved this point." App. 11a & n.6. Finally, the court conclusively stated:

> [T]his court readily concludes that the Agreement simply requires it to determine a "reasonable" fee independent of any alleged limitations associated with the URA. App. 15a.

Nevertheless, rather than determining and applying the parties' intent that no statutory limitations apply to the determination of a reasonable fee, the lower court found that "this case should be guided by statutory-fee shifting principles." App. 23a. Thereupon, the lower court examined the

law of fee-shifting jurisprudence as developed by this Court in *Hensley* and its progeny and incorrectly applied restrictions from those cases to Petitioners' fee petition.[15] App. 23a-28a. In doing so, the lower court improperly engrafted Congressional intent upon the parties' contractual agreement and erroneously extended this Court's fee-shifting jurisprudence beyond the boundaries clearly established by this Court.

2.a. The Court of Federal Claims's decision also directly conflicts with decisions of the Seventh and Ninth Circuits. Both the Seventh and Ninth Circuits have squarely held that, in the context of a written settlement agreement providing for an award of reasonable attorneys' fees to one party, neither statutory fee-shifting principles nor common fund principles bind the court. *Wing*, 114 F.3d at 989; *Dutchak*, 932 F.2d at 594. Rather, such a fee award is a matter of contract interpretation alone.

In *Wing*, the plaintiffs brought a class action against the defendant for alleged violations of federal environmental pollution statutes. The parties executed a $67.5 million settlement agreement, including $60.5 million in cash "which was not guaranteed, but would come from [defendant's] potential recovery on an insurance claim." *Id.* at 988.

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[15] Without regard to the fact that there was no fee-shifting statute at issue, the lower court even noted that nothing about the instant case set it apart from *Dague*. App. 27a n.20. *Dague*, however, is particularly illustrative of the manner in which fee-shifting cases are inapposite to the case at bar, because the most significant underpinning of the rationale for the *Dague* Court's rejection of enhancement for risk—that lawyers seeking enhancement for risk under fee-shifting statutes would subsidize losing cases with winning ones—is not applicable at all to the instant case. Undisputed testimony at trial demonstrated that this was an extraordinary case for Petitioners' law firm, constituting "the first and only inverse condemnation case * * * ever taken on a contingency." Appellants' Fed. Cir. Br. 61.

Additionally, as here, the defendant contractually agreed "to pay the reasonable attorney fees and expenses of class counsel, as determined by the court, [which defendant] agreed to pay directly, rather than detracting from the recovery given to the class." *Id.* at 987-988. Relying upon the parties' contract, the district court noted the total benefits obtained (both guaranteed and not) and "determined that a fee of $8 million was 'fair and reasonable.' " *Id.* at 988.

On appeal, the defendant argued that the district court's fee award was erroneously based upon the parties' contracts rather than the "body of law pertaining to statutory fee awards." *Id.* at 987. Thus, the Ninth Circuit framed the issue in identical fashion to that facing the Court of Federal Claims in the instant case:

> We consider what constitutes a reasonable attorney fee in the context of a written settlement agreement and whether the body of law pertaining to statutory fee awards or "common fund" cases has application here. *Id.* at 987.

But unlike the Court of Federal Claims, the Ninth Circuit made clear that the fee dispute was governed solely by contract, and not statutory, principles:

> At the outset, we note that the fee dispute in this case arises out of contract: in the Settlement Agreement, [defendant] agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court. The Attorney Fee Agreement did not limit the district court's discretion in determining the fee * * * . Under the Settlement Agreement, the only constraint on the district court's discretion was the requirement that the fee be "reasonable. *Id.* at 988.

Because the only contractual limitation upon the district court's discretion was that the fee be reasonable, the Ninth Circuit, in sharp contrast to the Court of Federal Claims in

this case, declined to pigeonhole the dispute as either fee shifting or common fund:

> We recognize that this situation is neither fish nor fowl nor fair weather game; i.e., neither *Dague* (in that the fee-shifting is voluntary and contractual rather than statutorily-mandated) nor *WPPSS* (in that class counsel's fee would come from the defendant directly and not out of the class recovery). *Id.* at 989.

Whereupon, the Ninth Circuit correctly found that the parties' settlement agreement alone provided the adequate, bargained-for basis for the fee award independent of any limitations contained in the body of law pertaining to statutory fee awards. Thus, *Wing* is squarely in conflict with the decision of the Court of Federal Claims in this case.

b. Similarly, in *Dutchak*,, 932 F.2d at 595, the plaintiffs brought a class action against the defendant pension fund administrator for alleged ERISA violations. The parties' settlement agreement authorized the court to award attorneys' fees in accordance with "factors" listed in four specific federal cases, as well as "other relevant federal court decisions based thereon." *Id* at 593. As a result, the district court limited its discretion to the specified case law, applied a multiplier of two to the lodestar, and entered a fee award of $5 million. In basing its decision upon the parties' contract, the court explained that "[t]he settlement agreement provisions set forth the standards to be applied, and the [defendant] is obligated to pay and Plaintiffs' attorneys are entitled to receive appropriate fees under those standards, no more and no less." *Id.* at 595.

On appeal, as here, the defendant argued that statutory fee-shifting principles controlled and therefore the multiplier awarded violated Supreme Court precedent prohibiting multipliers in statutory fee-shifting cases. *Id.* The defendant contended this precedent—though not specified in the agreement—was nevertheless relevant under the "other

relevant federal court decisions based thereon" phrase. *Id.* at 593. The defendant asserted that "this phrase require[d] inclusion of subsequent decisions not only interpreting but perhaps altering the holdings of the four named cases." *Id.* at 595.

The Seventh Circuit rejected this argument, finding the fee dispute to be purely and solely "a matter of contract interpretation." *Id.* at 594. The court reasoned:

> [D]efendants and plaintiffs have agreed that plaintiffs' attorneys are to be paid by applying principles in the settlement, and the court's job is to interpret the contract's meaning * * * . Instead of classifying the case as "common fund" or "fee shifting," [the court] must plumb the language of the settlement to determine its meaning and, if ambiguous, to determine the parties' intent. *Id.* at 594-595.

Applying familiar contract principles, the Seventh Circuit found the defendant's position "inconsistent with the settlement. The settlement limited the discretion of the judge in determining the appropriate level of attorneys' fees. For the judge later to consider cases overruling or changing the standards of the four named controlling cases would destroy the certainty for which both parties bargained." *Id.* Because the specified cases uniformly authorized lodestar multipliers, the district court properly "interpreted the settlement according to its terms and in accord with the parties' intent." *Id.* at 598.

Dutchak stands for the important proposition that when litigants contractually agree to a fee award under a settlement agreement, statutory fee shifting principles do not apply unless the parties so intended. Under *Dutchak*, the fee award at issue was a matter of contract interpretation governed by the parties' Settlement Agreement, not by the body of law pertaining to statutory fee awards. Thus, *Dutchak* is squarely

in conflict with the decision of the Court of Federal Claims in this case.

Both *Wing* and *Dutchak* illustrate that where a contractual agreement provides for the payment of attorneys' fees, the fee award is governed by the parties' contract, not by the body of law pertaining to statutory fee awards. The Court of Federal Claims in this case, however, despite concluding that "there is not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the URA," and despite holding that "this court readily concludes that the Agreement simply requires it to determine a 'reasonable' fee independent of any alleged limitations associated with the URA," still held that its consideration of the Petitioners' fee award was limited by the body of law pertaining to statutory fee awards. App. 11a, 15a. Thus, the Federal Circuit's affirmance of the Court of Federal Claims's decision creates a circuit split that can only be resolved by this Court.

II. THE COURT OF FEDERAL CLAIMS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE FOURTH AND NINTH CIRCUITS ON THE STANDARD UNDER WHICH A PLAINTIFF IS ENTITLED TO FEE ENHANCEMENT IN AN EXCEPTIONAL CASE.

Even if the Court of Federal Claims was entitled to apply this Court's jurisprudence regarding fee-shifting statutes to the Settlement Agreement, it used an improper and impossible standard that conflicts with other courts' application of the "exceptional results" factor.

1. This Court clearly intends that plaintiffs' attorneys be able to achieve a results enhancement in exceptional cases. *See Delaware Valley I*, 478 U.S. at 565 (finding enhancement proper in rare and exceptional cases); *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 435 (concluding enhanced award justified in cases of exceptional success)). The lower court,

however, effectively precluded plaintiffs' attorneys from ever recovering a results enhancement by creating an impossible standard that requires attorneys to either plead their cases improperly or forego any fee enhancement for an exceptional result.

In its Order on Attorneys Fees, the lower court concluded that:

> [I]t is far from clear that the results here are exceptional * * * . [Although] [i]n pure dollar terms, of course, the settlement here is considerable * * * [t]he results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. Accordingly, measured by plaintiffs' own expectations at the outset of this case, the results obtained were not exceptional, but rather reflect what was owed. App. 45a-46a.

To make a case for exceptionality, this standard requires plaintiffs to adduce evidence that they achieved something other than they desired to accomplish in filing suit, as well as that they achieved more than a court could lawfully award in judgment. Such a standard is incorrect. According to the lower court's standard, a plaintiff could achieve a stunning landmark victory against impossible odds, triumph where no one had ever dared venture, recover one hundred percent of the relief sought, and still have the result be deemed unexceptional simply because the plaintiff achieved what it set out to achieve and nothing more. More to the point, by the lower court's reasoning, the fact that the United States landed a man on the moon in 1969 was not exceptional because the United States simply achieved what it set out to accomplish and did not land on a planet as well.

Under the Federal Rules of Civil Procedure, a plaintiff must specifically plead for all relief sought. *See* Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief * * *

shall contain * * * a demand for judgment for the relief the pleader seeks."); Fed. R. Civ. P. 9(g) ("When items of special damage are claimed, they shall be specifically stated."). At the same time, Rule 11 provides for sanctions against parties (and counsel) who assert claims for relief without an evidentiary basis at the time of filing. *See* Fed. R. Civ. P. 11(b). Thus, to satisfy the new Court of Federal Claims legal standard for exceptionality, future counsel must either *over*-plead the case at the risk of sanctions, or *under*-plead the case at the risk of waiving claims for relief and hence malpractice. Because this standard actually penalizes counsel for doing their homework and properly pleading the case in compliance with the Federal Rules of Civil Procedure, it is clearly erroneous as a matter of law. Fee enhancement in exceptional cases cannot require litigants to violate the Federal Rules of Civil Procedure.

2. Moreover, this standard conflicts with the analysis used by other courts in evaluating exceptional results enhancements. For example, in *Hyatt*, the Fourth Circuit approved an "exceptional result[]" multiplier where "plaintiffs have succeeded in forcing the Social Security Administration to halt application of a secret, unlawful policy to its determination of hundreds of thousands of disability claims in North Carolina and, perhaps, to many hundreds of thousands more outside of North Carolina." 195 F.3d at 191-192. Although discontinuing the "secret, unlawful policy" was the basis for the lawsuit and the result sought by the plaintiffs, this did not preclude a finding of exceptionality. *See id.*[16]

Furthermore, the Court of Federal Claims's decision conflicts with that of the Ninth Circuit in *Wing*, 114 F.3d at 989.

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[16] Although the *Hyatt* case ultimately brought the same benefit to a greater number of people than those included in the original class, no less is true of the result obtained in this case, which benefited numerous public and private beachfront property owners in addition to Petitioners. Appellants' Fed. Cir. Br. 28.

Faced with a similar contractual settlement agreement, the court addressed the issue based upon the specific facts before it, just as the Court of Federal Claims has held fee petitions should be viewed. *See Erickson* v. *Secretary, Dept. of Health & Human Services*, 1999 WL 1268149, at *6 (Fed. Cl. Dec. 10, 1999) ("[E]very fees petition must be decided on a case by case basis."). In *Wing*, the Ninth Circuit examined the record carefully, noting that the District Court had stressed "the first-rate job the lawyers did, their sheer endurance, and the exceptional results obtained, which the court viewed as especially remarkable in light of the quality of opposition counsel and [defendant's] record of success in this type of litigation."[17] *Id.* at 989. Accordingly, the *Wing* court affirmed the district court's application of an exceptional results multiplier.

Thus, the lower court's decision in this case is not only contrary to this Court's jurisprudence, but is also contrary to that of the Fourth and Ninth Circuits.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

The United States Court of Federal Claims is a court of National jurisdiction. *See Branning*, 7 Cl. Ct. at 783. Pursuant to the Tucker Act, 28 U.S.C. § 1491, the Court of Federal Claims has jurisdiction over all claims for money damages arising out of contracts of the United States. Thus, its decisions—and those of the United States Court of Appeals for the Federal Circuit—not only have National implications, but have far-reaching impact upon federal contract

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[17] The *Wing* court further justified the multiplier award on the basis of "counsel's continuing obligations to the class," *id.* at 989, a factor also present in the instant case. Appellants' Fed. Cir. Br. 18.

law.[18] Viewed in this light, it is clear that the rule of law adopted by the Court of Federal Claims and the Federal Circuit would undermine the law of federal contracts.

In the instant case, the lower court found there to be "not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' fee would be controlled by the URA." App. 11a. Nevertheless, the court went on to decide that "this case should be guided by *statutory*-fee shifting principles." App. 23a (emphasis added). This decision engrafted Congressional intent upon the interpretation of a contractual agreement in a situation where the parties had unquestionably not intended such intent to apply. Such a far-reaching decision stands traditional rules of contract interpretation upon their head.

This Court stated in *Standard Rice*, 323 U.S. at 111, that the "United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs." A judicially created rule that would effectively allow Congress to unilaterally modify and engraft a contrary intent upon the Executive Branch's lawful contractual agreements would erode confidence in contracts of the United States.

The implications of such a rule extend into the private sector as well. If the United States, whose contracts are as subject to the law of contracts as are those of private parties, is allowed to engraft an unbargained-for and contrary intent upon its agreements by legislative enactment, then legislative enactment could also be utilized to engraft Congressional intent upon lawful private agreements. Thus, no contractual agreement would be safe from interpretation completely

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[18] This is particularly true where, as here, the Court of Federal Claims publishes its decision as important nationwide precedent. *See Applegate* v. *United States*, 52 Fed. Cl. 751 (2002).

contrary to the original intent of the parties as expressed in the bargained-for terms of their agreement.

Public policy wisely encourages settlement. *See McDermott*, 511 U.S. at 215. Where two parties have entered into a lawful settlement agreement, they must have confidence that their agreement will be interpreted as intended by the parties. This is especially true where one of those parties is the government. *See generally Standard Rice*, 323 U.S. at 111; *American Surety*, 322 U.S. at 101; *Hollerbach*, 233 U.S. at 171-172. Injecting uncertainty into the settlement process will discourage settlement and thwart public policy. Here, rather than honoring the bargained-for contract terms agreed to by the parties, the lower court imposed unbargained-for fee-shifting restrictions and prohibitions upon Petitioners' fee award. Such a decision is contrary to the long-standing jurisprudence of this Court.

The second question presented also raises an issue of recurring National importance. Because the Court of Federal Claims is a court of National jurisdiction, its decisions—and those of the United States Court of Appeals for the Federal Circuit—have National implications. *See Branning*, 7 Cl. Ct. at 783. In the *Delaware Valley* cases and *Blum*, this Court left unresolved the standards to be applied in determining whether enhancement is warranted in exceptional cases. The lower court's decision in this case sets forth a standard nullifying this Court's express authorization of enhancement in exceptional cases under fee-shifting statutes. This case presents the need and opportunity for this Court to provide guidance on the standards to be applied in determining exceptionality.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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